

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRANDON A. PINOLA,

Petitioner,

v.

STATE OF CALIFORNIA.

Respondent.

No. C 12-06050 EJD (PR)

**ORDER DENYING PETITION FOR
 WRIT OF HABEAS CORPUS;
 DENYING CERTIFICATE OF
 APPEALABILITY**

Petitioner has filed a pro se petition for a writ of habeas corpus under 28 U.S.C. § 2254 challenging his state conviction. For the reasons set forth below, the Petition for a Writ of Habeas Corpus is **DENIED**.

BACKGROUND

On March 11, 2010, Petitioner was found guilty by a jury in Mendocino County Superior Court of first degree murder of Gerald Knight, (Cal. Pen. Code § 187, subd. (a)).¹ Petitioner was sentenced to twenty-five years to life in state prison, plus a two-year determinative term for an “on-bail” enhancement.

¹Petitioner’s codefendant, Alva Reeves, was also convicted of the crime in a joint trial.

Petitioner appealed his conviction, and the state appellate court affirmed on May 7, 2012. (Ans. Ex. 6.) The state high court denied review on August 8, 2012. (Id., Ex. 8.)

Petitioner filed the instant federal habeas petition on November 8, 2012.

FACTUAL BACKGROUND

The California Court of Appeal summarized the facts as follows:

Gerald Knight was known to be a “track person,” an alcoholic who lived in a small homeless community along the abandoned railroad tracks in Ukiah. Defendant Reeves and Knight were a couple. Reeves often hung out and drank with Knight and other “track people.”

On the afternoon of the murder, while Reeves was with him, Knight went to a nearby bank with his friends and they gave him \$80. He put the money in his left pocket. Later Reeves and Knight returned to the tracks, where they were joined by defendant Pinola and offered him a beer. Pinola spent the day drinking. He eventually left to look for his girlfriend and shower, but he later returned to the tracks and drank another couple of beers with Reeves and Knight. When Reeves and Knight started arguing about a woman, Pinola left for a nearby bar because he “didn’t want to hear any drama.”

When Pinola was drinking beer at the bar, Reeves came in and invited him back to the tracks. Reeves promised Pinola free beer and claimed he was going to “kick Gerald Knight’s ass.” Expecting some free entertainment, Pinola returned to the tracks with Reeves. Knight and Reeves resumed arguing. At some point Knight began putting things in his backpack, as if he were going to leave. According to Pinola, that is when Reeves grabbed an object and hit Knight in the face with it. Knight stumbled and fell to the ground. Reeves viciously and repeatedly punched and kicked Knight while he was down.

Reeves and Pinola returned to the bar, and went directly to the men’s room to clean themselves up. Reeves was wearing Knight’s backpack. While Pinola was wiping blood off his shoe and Reeves was cleaning his hands and face with paper towels, customer David McCarty entered the restroom. Reeves looked “ruffled up” and seemed a little frantic about cleaning up and checking himself over. McCarty said that it looked like the two had been in a fight. Pinola responded, “yeah, we really messed him up,” or “we really fucked him up,” and made a kicking gesture as if he were stomping on someone who was down.

After they cleaned up, Reeves and Pinola ordered a pitcher of beer and sat at a back table. Pinola had \$60 or \$70 in his pocket, even though he later told police he was broke the night of the murder.

After a while, Reeves walked up to Aaron Wear, a complete stranger, and told Wear that he had just killed someone by the railroad tracks. Reeves showed Wear his hands, which looked “beaten up,” and there was blood on his shirt.

Knight’s body was found on the tracks the next morning. His throat had been slit, most likely with a piece of broken glass. There were numerous contusions and lacerations to his head and neck, multiple hemorrhages into and under his skull, and two broken ribs on each side of his body. The causes of death were blunt force trauma to the head and a laceration of his jugular vein and carotid artery. Knight’s pockets had been pulled out and his cash was gone. A few days later Knight’s backpack was found in the bar.

DNA from blood found on Reeves’s and Pinola’s shoes matched Knight’s DNA profile. Bloody footprints on the back of Knight’s pants were consistent with shoes seized from Pinola, but not Reeves.

Reeves’s Defense

Reeves argued that he was too drunk and psychologically impaired to form the requisite state of mind for murder. Moreover, it was Pinola who killed Knight and he was trying to pin it on Reeves. Neuropsychologist Eugene Couture, Ph.D. testified that Reeves suffered from dementia caused by a severe head injury in 1990, an ongoing seizure disorder, and a long history of substance abuse. Dr. Couture’s testing also indicated antisocial personality disorder and a significant impairment of Reeves’s ability to organize and plan his actions.

Pinola’s Defense

Pinola maintained that it was Reeves, not he, who murdered Knight. He testified that he tried to pull Reeves off of Knight during the fight, but gave up when Reeves elbowed him and forced him to let go. Pinola denied that he hit or kicked Knight. Pinola watched Reeves beat Knight for three or four minutes, then left and returned to the bar. As he was leaving he saw Reeves flip Knight onto his belly, pull back his hair and make a motion with something he was holding in his hand.

Although Pinola told the police otherwise, he “had an idea” that Knight was dead when he left the tracks.

Reeves followed Pinola to the bar, where they cleaned themselves up in the bathroom, when McCarty came in and asked if the two had been in a fight, Pinola said that “he,” meaning Reeves – not “we” – had “kicked the shit out of him.” Then Reeves and Pinola shared a pitcher of beer.

(Ans. Ex. 6 at 1-3.)

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DISCUSSION

I. Standard of Review

This Court may entertain a petition for a writ of habeas corpus “in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). The writ may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court’s adjudication of the claim: “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d).

“Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts.” Williams v. Taylor, 529 U.S. 362, 412-13 (2000). The only definitive source of clearly established federal law under 28 U.S.C. § 2254(d) is in the holdings (as opposed to the dicta) of the Supreme Court as of the time of the state court decision. Williams, 529 U.S. at 412; Brewer v. Hall, 378 F.3d 952, 955 (9th Cir. 2004). While circuit law may be “persuasive authority” for purposes of determining whether a state court decision is an unreasonable application of Supreme Court precedent, only the Supreme Court’s holdings are binding on the state courts and only those holdings need be “reasonably” applied. Clark v. Murphy, 331 F.3d 1062, 1069 (9th Cir.), overruled on other grounds by Lockyer v. Andrade, 538 U.S. 63 (2003).

“Under the ‘unreasonable application’ clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that principle to the facts

of the prisoner's case." Williams, 529 U.S. at 413. "Under § 2254(d)(1)'s 'unreasonable application' clause, . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." Id. at 411. A federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was "objectively unreasonable." Id. at 409. The federal habeas court must presume correct any determination of a factual issue made by a state court unless the petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

The state court decision to which Section 2254(d) applies is the "last reasoned decision" of the state court. See Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991); Barker v. Fleming, 423 F.3d 1085, 1091-92 (9th Cir. 2005). When there is no reasoned opinion from the highest state court considering a petitioner's claims, the court "looks through" to the last reasoned opinion. See Ylst, 501 U.S. at 805. In this case, the last reasoned opinion is that of the California Court of Appeal. (Ans. Ex. 6.)

The Supreme Court has vigorously and repeatedly affirmed that under AEDPA, there is a heightened level of deference a federal habeas court must give to state court decisions. See Hardy v. Cross, 132 S. Ct. 490, 491 (2011) (per curiam); Harrington v. Richter, 131 S. Ct. 770, 783-85 (2011); Felkner v. Jackson, 131 S. Ct. 1305 (2011) (per curiam). As the Court explained: "[o]n federal habeas review, AEDPA 'imposes a highly deferential standard for evaluating state-court rulings' and 'demands that state-court decisions be given the benefit of the doubt.'" Id. at 1307 (citation omitted). With these principles in mind regarding the standard and limited scope of review in which this Court may engage in federal habeas proceedings, the Court addresses Petitioner's claims.

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II. **Claims and Analysis**

Petitioner claims the following as grounds for federal habeas relief: (1) the trial court erred by instructing the jury that his testimony required supporting evidence; (2) the trial court erred in admitting evidence of a prior bad act; (3) the trial court erred by instructing the jury that Petitioner could be found “equally guilty” as an aider and abettor; and (4) cumulative error.

A. **Jury Instruction Claims (1 and 3)**

1. **Instruction Regarding Supporting Evidence (Claim 1)**

Petitioner’s first claim is that he was denied his right to present a defense by the trial court’s instruction to the jury that Petitioner’s testimony required supporting evidence.

The specific instruction which Petitioner challenges is CALCRIM No. 301, which the state appellate court cited as follows:

“Except for the testimony of Brandon Pinola, which requires supporting evidence, the testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all of the evidence.” The court went on to instruct the jury on conflicts in evidence, evidence admitted for a limited purpose, prior statements by defendants, impeachment evidence, and expert and lay testimony.

...

“[T]o the extent that Brandon Pinola gave testimony that tends to incriminate Alva Reeves it should be viewed with care and caution. This does not mean, however, that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in light of all the evidence in the case. [¶] Before you may consider the testimony of Brandon Pinola as evidence against the defendant Alva Reeves regarding the crimes of murder and/or manslaughter, you must decide whether Brandon Pinola was an accomplice in those crimes. ...[¶] If you decide that Brandon Pinola was not an accomplice, then supporting evidence is not required and you should evaluate his testimony as you would that of any other witness. [¶] If you decide that Brandon Pinola was an accomplice, then you may not convict the defendant of murder or manslaughter based on his testimony alone. You may use the testimony of an accomplice to convict the defendant only if: [¶] 1) The accomplice’s testimony is supported by other evidence that you believe; [¶] 2) That supporting evidence is independent of the accomplice’s testimony; [¶] 3) That supporting evidence tends to connect the defendant to the commission of the

crime or crimes. [¶] Supporting evidence, however, may be slight. It does not need to be enough by itself to prove that the defendant is guilty of the charged crime and it does not need to support every fact about which the accomplice testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.”

(Ans. Ex. 6 at 4-5.)

Respondent contends that this claim was forfeited by Petitioner’s failure to object or by failing to request that a clarifying instruction be given at trial. The state appellate court agreed, and then also rejected the claim on the merits.

Pinola argues that CALCRIM No. 301 erroneously informed the jury his testimony required corroboration in all circumstances, and that the error was not cured by the later instruction that corroboration was not required if the jury found he was *not* an accomplice because “this instruction does not apply until the jury first determined that a witness is not an accomplice, but pursuant to CALCRIM No. 301 the jury in this case would have required other evidence supporting Mr. Pinola’s testimony before the jury could have decided he was not an accomplice.” Therefore, he asserts the court should have modified CALCRIM No. 301 to say “the testimony of only one witness can prove any fact, except that any testimony of Brandon Pinola *which incriminates Alva Reeves* requires supporting evidence before you can consider that testimony against Mr. Reeves.” (Italics added.)

The People contend, correctly, that Pinola forfeited this contention by failing to object to CALCRIM No. 301. “Generally, “[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.”” (*People v. Samaniego* (2009) 172 Cal.App.4th 148, 1168 (*Samaniega*); *People v. Tuggles* (2009) 179 Cal.App.4th 339, 364.) Pinola is not arguing that CALCRIM No. 301 is an incorrect statement of the law, but rather claims that it was misleading in the circumstances without additional language clarifying that it applied only to Pinola’s testimony that incriminated Reeves. To preserve this claim for appeal, Pinola was required to request clarifying language at trial. (*Ibid.*; see also *People v. Spurlock* (2003) 114 Cal.App.4th 1122, 1130.) He did not.

Nonetheless, we are satisfied that any possible ambiguity introduced by the instruction did not implicate Pinola’s due process rights. ““[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.” [Citation.] If the charge as a whole is ambiguous, the question is whether there is a “reasonable likelihood that the jury has applied the challenged instruction in a way” that violates the Constitution.” [Citation.] (*People v. Huggins* (2006) 38 Cal.4th 175, 192; *People v.*

1 *Letner* (2010) 50 Cal.4th 99, 186.) Here, shortly after it gave
 2 CALCRIM No. 301, the court instructed the jurors that they must
 3 decide whether Pinola was an accomplice before they considered his
 4 testimony as evidence against Reeves. It also explained that “If you
 5 decide that Brandon Pinola was not an accomplice, then supporting
 6 evidence is not required and you should evaluate his testimony as
 7 you would that of any other witness.” The instructions, as a whole,
 8 adequately clarified that the corroboration requirement applied only
 9 to testimony that was unfavorable to Reeves, and only if the jurors
 10 found he was an accomplice. No reasonable juror would have
 11 engaged in the mental gymnastics required to interpret CALCRIM
 12 No. 301 as meaning they could not accept Pinola’s denial that he was
 13 an accomplice unless it was corroborated by some other evidence.
 14 Moreover, there was substantial evidence that corroborated Pinola’s
 15 testimony that it was Reeves, not him, who killed Knight – e.g.,
 16 Reeve’s bloody clothes and injured hands, Knight’s DNA on his
 17 shoes, his possession of Knight’s backpack, and his statement to a
 18 stranger in the bar that he had just killed someone.

19 (Ans. Ex. 6 at 5-6.)

20 In reviewing an ambiguous instruction, the inquiry is not how reasonable
 21 jurors could or would have understood the instruction as a whole; rather, the court
 22 must inquire whether there is a “reasonable likelihood” that the jury has applied the
 23 challenged instruction in a way that violates the Constitution. See Estelle v.
 24 McGuire, 502 U.S. at 72 & n.4; Boyde v. California, 494 U.S. 370, 380 (1990);
 25 Ficklin v. Hatcher, 177 F.3d 1147, 1150-51 (9th Cir. 1999) (harmless error when
 26 certain that jury did not rely on constitutionally infirm instruction). In order to show
 27 a due process violation, the defendant must show both ambiguity and a “reasonable
 28 likelihood” that the jury applied the instruction in a way that violates the
 Constitution, such as relieving the state of its burden of proving every element
 beyond a reasonable doubt. Waddington v. Sarausad, 555 U.S. 179, 190-191 (2009)
 (internal quotations and citations omitted).

Furthermore, the instruction may not be judged in artificial isolation, but must
 be considered in the context of the instructions as a whole and the trial record. See
Estelle, 502 U.S. at 72. In other words, the court must evaluate jury instructions in
 the context of the overall charge to the jury as a component of the entire trial
 process. United States v. Frady, 456 U.S. 152, 169 (1982) (citing Henderson v.

Kibbe, 431 U.S. 145, 154 (1977)); Prantil v. California, 843 F.2d 314, 317 (9th Cir.1988)

A determination that there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution establishes only that an error has occurred.² See Calderon v. Coleman, 525 U.S. 141, 146 (1998). If an error is found, the court also must determine that the error had a substantial and injurious effect or influence in determining the jury's verdict, see Brecht v. Abrahamson, 507 U.S. 619, 637 (1993), before granting relief in habeas proceedings. See Calderon, 525 U.S. at 146-47.

Here, Petitioner has failed to show that there was a "reasonable likelihood" that the jury applied the challenged instruction in a way that violates the Constitution. The state court properly reviewed the challenged instruction in the context of the overall charge to the jury. See Estelle, 502 U.S. at 72. Here, the corroboration instruction regarding Petitioner's testimony was qualified with the directive that the jury must first decide whether or not Petitioner was an accomplice in those crimes. See supra at 6. The instructions thereafter very clearly defined the parameters for evaluating his testimony: "If you decide that Brandon Pinola was not an accomplice, then supporting evidence is not required and you should evaluate his testimony as you would that of any other witness. [¶] If you decide that Brandon Pinola was an accomplice, then you may not convict the defendant [Reeves] of murder or manslaughter based on his testimony alone." Id. There was nothing ambiguous about the instructions that would lead the jury to believe that they had to completely disregard Petitioner's testimony without corroborating evidence. Furthermore, as pointed out by the state court, the jury could certainly consider Petitioner's testimony because there was substantial evidence that corroborated his

²A "reasonable likelihood" is lower than the "more likely than not" standard but higher than a mere "possibility." Polk v. Sandoval, 503 F.3d 903, 910 (9th Cir. 2007).

assertion that Reeves killed Knight, “e.g., Reeve’s bloody clothes and injured hands, Knight’s DNA on his shoes, his possession of Knight’s backpack, and his statement to a stranger in the bar that he had just killed someone.” Id. at 8. Because there was no error, the Court need not determine whether an error was harmless under Brecht, 507 U.S. at 637. Accordingly, the state court’s rejection of this claim was not contrary to, or involved an unreasonable application of, Supreme Court precedent. 28 U.S.C. § 2254(d)(1). Petitioner is not entitled to habeas relief on this claim.

2. Instruction for Aider and Abettor Liability (Claim 3)

Petitioner also claims that the jury instruction regarding aider and abettor liability, CALCRIM No. 400, violated due process because it instructed the jury that an aider and abettor is “equally guilty” as the direct perpetrator, and the trial court failed to sua sponte inform the jury that he could be guilty of a lesser offense. Respondent first asserts that because Petitioner failed to object to the instruction at trial, this claim is procedurally defaulted. The state court noted the lack of objection and cited the instruction given at trial:

Without objection the trial court gave the following general instruction on aiding and abetting: “A person may be guilty of a crime in two ways: [¶] 1) He or she may have directly committed the crime. I will call that person the perpetrator. [¶] 2) He or she may have aided or abetted a perpetrator, who directly committed the crime. [¶] A person is equally guilty of the crime whether he or she committed it personally or aided or abetted the perpetrator who committed it.” (CALCRIM No. 400.)

(Ans. Ex. 6 at 7.)

The state court also concluded that Petitioner had forfeited this claim:

Because the version of CALCRIM No. 400 given was generally an accurate statement of the law, even if arguably misleading in this case, Pinola was obligated to request a clarification or modification in the trial court and forfeited the contention by not doing so. (*Samaniego, supra*, 172 Cal.App.4th at p. 1163; *People v. Lopez, supra*, 198 Cal.App.4th at pp. 1118-1119; *People v. Tuggles, supra*, 179 Cal.App.4th at p. 364.)

(Id. at 8.)

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Even assuming that the claim was not procedurally defaulted, Respondent asserts that Petitioner has failed to state a federal claim. Respondent is correct that the failure of a state trial court to instruct on lesser-included offenses in a non-capital case does not present a federal constitutional claim. See Solis v. Garcia, 219 F.3d 922, 929 (9th Cir. 2000); Windham v. Merkle, 163 F.3d 1092, 1105-06 (9th Cir. 1998); Turner, 63 F.3d at 819 (citing Bashor v. Riley, 730 F.2d 1228, 1240 (9th Cir.), cert. denied, 469 U.S. 838 (1984)); cf. Vickers v. Ricketts, 798 F.2d 369, 371 (9th Cir. 1986) (where evidence supports lesser-included-offense instruction in capital case, due process requires that court give instruction sua sponte), cert. denied, 479 U.S. 1054 (1987). However, “the defendant’s right to adequate jury instructions on his or her theory of the case might, in some cases, constitute an exception to the general rule.” Solis, 219 F.3d at 929 (citing Bashor v. Risley, 730 F.2d at 1240). Solis suggests that there must be substantial evidence to warrant the instruction on the lesser included offense. See Solis, 219 F.3d 929-30 (no duty to instruct on voluntary manslaughter as lesser included offense to murder because evidence presented at trial precluded a heat of passion or imperfect self-defense instruction; no duty to instruct on involuntary manslaughter because evidence presented at trial implied malice). Here, the jury was in fact instructed on the lesser offense of second degree murder and manslaughter. (Trav., Ex. 1 at 35, fn. 8.) Therefore, the only issue is whether the trial court was required to give further clarifying instructions.

Even if we assume that the trial court erred in failing to do so, the state court reasonably concluded that any error was harmless:

Moreover, Pinola was not prejudiced. He contends the jury could have found he did not premeditate and deliberate the killing, “but rather just got in a couple of kicks on the spur of the moment,” and was therefore guilty of no more than second degree murder. But the jury was properly instructed that, to prove a defendant was an aider and abettor, the People must prove the perpetrator intended to commit the crime and that the defendant intended to aid and abet the perpetrator in committing that crime. It was also instructed that each of the homicide instructions, including the instructions on intent,

applied separately to Pinola and Reeves. Finally, the jury was instructed that “If you conclude that the defendant was intoxicated at the time of the alleged crime, you may consider this evidence in deciding whether the defendant: [¶] A. Knew that the perpetrator of the crime intended to commit a homicide; and [¶] B. The defendant intended to aid and abet the perpetrator in committing a homicide.” In light of the jury charge as a whole, any possible confusion created by giving CALCRIM No. 400 was harmless because other instructions correctly instructed the jury on the intent required to convict Pinola of murder under an aider and abettor theory.

(Ans. Ex. 6 at 9.)

The omission of an instruction is less likely to be prejudicial than a misstatement of the law. See Walker v. Endell, 850 F.2d at 475-76 (citing Henderson v. Kibbe, 431 U.S. at 155). Thus, a habeas petitioner whose claim involves a failure to give a particular instruction bears an “especially heavy burden.” Villafuerte v. Stewart, 111 F.3d 616, 624 (9th Cir. 1997) (quoting Henderson v. Kibbe, 431 U.S. 145, 155 (1977)). The significance of the omission of such an instruction may be evaluated by comparison with the instructions that were given. Murtishaw v. Woodford, 255 F.3d 926, 971 (9th Cir. 2001) (quoting Henderson, 431 U.S. at 156); see id. at 972 (due process violation found in capital case where petitioner demonstrated that application of the wrong statute at his sentencing infected the proceeding with the jury’s potential confusion regarding its discretion to impose a life or death sentence).

In light of the instructions that were given as a whole, the Court finds that Petitioner was not prejudiced by the omission of clarifying instructions. As discussed by the state appellate court, the remainder of the instructions on aider and abettor liability made it clear that the jury must find specific intent as to each defendant and perpetrator. Specifically, the jury had to first conclude that Reeves intended to commit the crime of first degree. See supra at 11. Then in order to find Petitioner guilty as an aider and abettor, the jury had to find that Petitioner intended to aid and abet Reeves in committing first degree murder. Id. Furthermore, even where intoxication was a factor, the jury was again instructed that Petitioner had to

know that Reeves intended to commit a homicide, and that Petitioner intended to aid and abet Reeves in committing a homicide. Id. The state court was not unreasonable in concluding harmless error because “other instructions correctly instructed the jury on the intent required to convict [Petitioner] of murder under an aider and abettor theory.” Id. at 12. Petitioner has failed to meet the ““especially heavy burden”” of showing constitutional error by the trial court’s omission of clarifying instructions. See Villafuerte, 111 F.3d at 624. Accordingly, the state court’s rejection of this claim was not contrary to, or involved an unreasonable application of, Supreme Court precedent. 28 U.S.C. § 2254(d)(1). Petitioner is not entitled to habeas relief on this claim.

B. Admission of Prior Conduct (Claim 2)

Petitioner’s second claim is that the trial court erred when it admitted evidence that Petitioner kicked a man in 2008. The state appellate court rejected this claim and found no error:

Pinola contends the trial court also erred when it admitted evidence of an incident about two months before Knight’s murder in which Pinola repeatedly and viciously kicked an older man who was lying helpless on the street. Because the two incidents were sufficiently similar, the court did not abuse its discretion when it admitted Pinola’s earlier assault to support an inference of intent and identity.

“Evidence that a defendant has committed crimes other than those currently charged is not admissible to prove that the defendant is a person of bad character or has a criminal disposition; but evidence of uncharged crimes is admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes. [Citation.] Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent.” (*People v. Kipp* (1998) 18 Cal.4th 349, 369; *People v. Foster* (2010) 50 Cal.4th 1301, 1328; Evid. Code, § 1101.) [FN2]

FN2. Further statutory references are to the Evidence Code.

The California Supreme Court has long recognized ““that if a person acts similarly in similar situations, he probably harbors the same intent in each instance” [citations], and that such prior conduct may be relevant circumstantial evidence of the actor’s most recent

1 intent. The inference to be drawn is not that the actor is *disposed* to
 2 commit such acts; instead, the inference to be drawn is that, in light
 3 of the first event, the actor, at the time of the second event, must
 4 have had the intent attributed to him by the prosecution.” (*People v.*
 5 *Rowland* (1992) 4 Cal.4th 238, 261.) “The least degree of similarity
 6 (between the uncharged act and the charged offense) is required in
 7 order to prove intent. [Citation.]... In order to be admissible to prove
 8 intent, the uncharged conduct must be sufficiently similar to support
 9 the inference that the defendant “probably harbor[ed] the same
 10 intent in each instance.”” (*People v. Foster, supra*, 50 Cal.4th at p.
 11 1328, quoting *People v. Ewoldt* (1994) Cal.4th 380, 402.) On the
 12 other hand, “[t]he greatest degree of similarity is required for
 13 evidence of uncharged misconduct to be relevant to prove identity....
 14 [T]he uncharged misconduct and the charged offense must share
 15 common features that are sufficiently distinctive so as to support the
 16 inference that the same person committed both acts. [Citation.] “The
 17 pattern and characteristics of the crimes must be so unusual and
 18 distinctive as to be like a signature.”” (*Ibid.*)

19 If the prior conduct evidence is sufficiently similar to the charged
 20 crime that it is relevant to the defendant’s intent, common plan, or
 21 identity, the trial court must then consider whether its probative
 22 value is substantially outweighed by the probability that its
 23 admission would create a substantial danger of undue prejudice
 24 under section 352. We review the trial court’s rulings under sections
 25 1101 and 352 for abuse of discretion. (*People v. Foster, supra*, 50
 26 Cal.4th at p. 1328.)

27 Here, in both incidents Pinola violently assaulted an older man, a
 28 stranger, as he lay helpless on the ground. Both assaults took place
 in the same vicinity, in public, and occurred only two months apart.
 On both occasions Pinola viciously and repeatedly kicked his prone
 victim in the midsection. Both victims suffered broken ribs.

Pinola admitted he had no motive to assault the first victim other
 than “just because,” and he did a victory dance during the attack.
 Similarly, according to his own testimony, Pinola went to the tracks
 with Reeves the night of Knight’s murder because he likes fights,
 was looking for some action and thought it would be a good show.
 In light of these parallels, the court did not abuse its discretion when
 it ruled that evidence of the prior incident was relevant to show both
 intent and identity.

The trial court’s ruling that the evidence of the prior assault was not
 substantially more prejudicial than probative was also well within its
 discretion. The testimony about the earlier beating was no more
 inflammatory than the evidence about the attack on Knight. No
 photographs or other graphic evidence of the first victim were put in
 evidence, and, unlike Knight, the prior victim survived. The jurors
 were told Pinola was on bail awaiting sentencing for the earlier
 assault when Knight was killed, so there was no danger they might
 be inclined to punish him for the uncharged crime whether or not
 they believed him guilty of murdering Knight. (See *People v.*
Ewoldt, supra, 7 Cal.4th at p. 405.) The prior act evidence was
 properly admitted.

(Ans. Ex. 6 at 9-11.)

Permitting a jury to hear evidence of prior crimes or bad acts may violate due process. See Marshall v. Lonberger, 459 U.S. 422, 438-39 n.6 (1983); Fritchie v. McCarthy, 664 F.2d 208, 212 (9th Cir. 1981) (citing Spencer v. Texas, 385 U.S. 554, 561 (1967)). A state court's procedural or evidentiary ruling is not subject to federal habeas review, however, unless the ruling violates federal law, either by infringing upon a specific federal constitutional or statutory provision or by depriving the defendant of the fundamentally fair trial guaranteed by due process. See Pulley v. Harris, 465 U.S. 37, 41 (1984); Jammal v. Van de Kamp, 926 F.2d 918, 919-20 (9th Cir. 1991). Accordingly, a federal court cannot disturb on due process grounds a state court's decision to admit evidence of prior crimes or bad acts unless the admission of the evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair. See Walters v. Maass, 45 F.3d 1355, 1357 (9th Cir. 1995); Colley v. Sumner, 784 F.2d 984, 990 (9th Cir.), cert. denied, 479 U.S. 839 (1986).

The Ninth Circuit has held that the admission of other crimes evidence violates due process where there are no permissible inferences the jury can draw from the evidence (in other words, no inference other than conduct in conformity therewith). See McKinney v. Rees, 993 F.2d 1378, 1384 (9th Cir. 1993); Jammal, 926 F.2d at 920. But it is generally upheld where: (1) there is sufficient proof that the defendant committed the prior act; (2) the prior act is not too remote in time; (3) the prior act is similar (if admitted to show intent); (4) the prior act is used to prove a material element; and (5) the probative value of admitting evidence of the prior act is not substantially outweighed by any prejudice the defendant may suffer as a result of its admission. See McDowell v. Calderon, 107 F.3d 1351, 1366 (9th Cir.) (sentencer may rely on prior criminal conduct not resulting in a conviction if the evidence has "some minimal indicium of reliability beyond mere allegation"), amended, 116 F.3d 364 (9th Cir. 1997), vacated in part by 130 F.3d 833, 835 (9th Cir. 1997) (en banc).

Here, the state court's admission of the prior bad act was not arbitrary or so prejudicial that it rendered the trial fundamentally unfair. See Walters, 45 F.3d at 1357. Evaluating the factors under McDowell, 107 F.3d at 1366, the Court is not convinced that the state court's admission of the prior bad act violated due process. First of all, there was no dispute over whether Petitioner actually committed the prior bad act. Secondly, the incident was not too remote in time as it occurred just two months before Knight's murder. The incident was sufficiently similar to Knight's murder to show intent: Petitioner, with no motive, had repeatedly and viciously kicked a man who was lying helpless in the street, and he admitted that he had accompanied Reeves to the tracks because he "likes fights, was looking for some action and thought it would be a good show." See supra at 11. The state court also reasonably determined that the incident was properly admitted to prove intent and identity, which are both material elements of first degree murder. Id. Lastly, there was no outweighing prejudicial effect over its probative value: no photographs or graphic evidence of the first victim were put in evidence, the first victim survived, and the jury was aware that Petitioner was already awaiting sentencing for the first assault and therefore not likely inclined to punish him for an uncharged crime. Id. Based on this analysis, it cannot be said that the admission of the evidence deprived Petitioner of a fundamentally fair trial guaranteed by due process. See Pulley, 465 U.S. at 41. Accordingly, the state court's rejection of this claim was not contrary to, or involved an unreasonable application of, Supreme Court precedent. 28 U.S.C. § 2254(d)(1). Petitioner is not entitled to habeas relief on this claim.

D. **Cumulative Error (Claim 4)**

Petitioner's last claim is that he is entitled to habeas relief based on the cumulative effect of the alleged state court errors. In some cases, although no single trial error is sufficiently prejudicial to warrant reversal, the cumulative effect of several errors may still prejudice a defendant so much that his conviction must be overturned. See, e.g., Alcala v. Woodford, 334 F.3d 862, 893-895 (9th Cir. 2003)

(reversing conviction where multiple constitutional errors hindered defendant's efforts to challenge every important element of proof offered by prosecution). However, where there is no single constitutional error existing, nothing can accumulate to the level of a constitutional violation. See Mancuso v. Olivarez, 292 F.3d 939, 957 (9th Cir. 2002).

Here, Petitioner has not demonstrated that there was even one constitutional error. Petitioner may disagree with the decisions of the state courts, but he has not shown that they were unreasonable under clearly established federal law. Accordingly, his claim of cumulative error must be denied.

CONCLUSION


After a careful review of the record and pertinent law, the Court concludes that the Petition for a Writ of Habeas Corpus must be **DENIED**.

Further, a Certificate of Appealability is **DENIED**. See Rule 11(a) of the Rules Governing Section 2254 Cases. Petitioner has not made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Nor has Petitioner demonstrated that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). Petitioner may not appeal the denial of a Certificate of Appealability in this Court but may seek a certificate from the Court of Appeals under Rule 22 of the Federal Rules of Appellate Procedure. See Rule 11(a) of the Rules Governing Section 2254 Cases.

The Clerk shall terminate any pending motions, enter judgment in favor of Respondent, and close the file.

IT IS SO ORDERED.

DATED: 11/20/2014


EDWARD J. DAVILA
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

BRANDON A. PINOLA,
Petitioner,

Case Number: CV12-06050 EJD

CERTIFICATE OF SERVICE

v.

STATE OF CALIFORNIA,
Respondent.

_____/

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 11/20/2014, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Brandon Pinola AD-2296
State Prison at Corcoran
P. O. Box 5242
Corcoran, CA 93212

Dated: 11/20/2014

Richard W. Wieking, Clerk
/s/ By: Elizabeth Garcia, Deputy Clerk